

MEMORIAL
OF
THE STATE OF INDIANA,

BY HER

Senators and representatives in general convention assembled, representing that it is her wish and desire that the Hon. Henry S. Lane and the Hon. William Monroe McCarty be admitted to seats in the Senate of the United States as the only legally elected and constitutionally chosen senators of that State.

JANUARY 24, 1859.—Read, referred to the Committee on the Judiciary, and ordered to be printed.

To the honorable the Senate of the United States:

The State of Indiana, by her senators and representatives in general assembly convened, would respectfully represent to your honorable body that, as she is not now, and has not been for some time, represented in the Senate of the United States, it is her wish and desire that the Hon. Henry S. Lane and the Hon. William Monroe McCarty be admitted to seats in the Senate of the United States as the only legally elected and constitutionally chosen senators of this State; and that they were so legally elected and constitutionally chosen on the 22d day of December, 1858, in compliance with the provisions of the following concurrent resolution, which preceded and prescribed the rule of such election, to wit:

“Whereas the State of Indiana has been and is now unrepresented in the Senate of the United States; and whereas there is now no law other than the Constitution of the United States, and of this State, providing for a choice by the legislature of this State; and whereas it is essential that this legislature should choose such senators at its present session—

“*Be it resolved by the senate, the house of representatives concurring therein*, 1st. That the senate and house of representatives shall, upon the passage of this resolution by either house, proceed immediately to the choice of persons to represent this State in the Senate of the United States, and that a majority of each house shall be necessary to such choice.

“2d. That each person who shall receive a majority of the votes given in both houses of this legislature shall be declared duly elected to represent the State of Indiana in the Senate of the United States;

the person first chosen shall be declared elected from the date of the election herein provided, and shall serve as such senator until the 4th of March, 1863; and the person next chosen shall, in like manner, serve as such senator until the 4th of March, 1861.

"3d. The secretary of the senate and the clerk of the house of representatives shall, immediately upon the choice as herein provided by the respective houses, certify the same to the secretary of state, who shall certify the same under the seal of the State to the Vice President of the United States, and also furnish to each of the persons so chosen, as herein provided, when application is made by such person or persons, or others for them, copies of their election or choice as such senators.

"4th. The said secretary of state shall furnish with the certificate, as herein provided, a copy of this resolution and the vote of each house thereon."

Your memorialist, as one of the sovereign powers that compose the Union, to the existence of which it is essential that equal and exact justice should be measured out to all in order to secure the harmony of the whole and perpetuate the mutual confidence that should actuate each in its intercourse with the others, would invoke your attention to the fact that her commission has not been awarded to any persons other than those herein named since a vacancy has occurred in her representation in your honorable body.

To the end that your memorialist may be more fully understood, it is but just and proper that a concise statement of the facts upon which your memorialist bases the propriety of the course which she has taken in the premises be now submitted for the consideration of your honorable body.

In doing this, it will be necessary to go back a little in your own as well as her history. In January of the year 1855 a regular session of the general assembly of this State, in accordance with the provisions of her constitution, was convened at Indianapolis. As her constitution provides that the sessions of the general assembly shall be held biennially, no other regular session would occur until January, 1857. On the 4th of March, 1855, a vacancy was to occur in the Senate of the United States by the expiration of the term of one of her senators. To supply this vacancy it was the duty of the general assembly of 1855 to provide by choosing some one of her citizens to serve as such senator. That general assembly adjourned upon the expiration of the time allowed by the constitution without having elected, chosen, or designated any one to act as her senator in your branch of the national legislature. Thus your memorialist was without her constitutional representation in your body. There was not any other session of her general assembly for two years, although provision is made in her constitution for an extra session whenever, in the opinion of her executive officer, it may be deemed necessary to convene the senators and representatives. In January in the year 1857 the general assembly of your memorialist was again convened. On the 4th of March, 1857, and before the adjournment of this session of the general assembly, another vacancy was to occur in your honorable body by the expiration of the term of the only remaining senator of your memorialist. Your

honorable body will now perceive that it was clearly the duty of this general assembly at its present session to provide that a choice should be made of two of the citizens of your memorialist to supply the vacancy that had already, in part, and soon would entirely, occur in your branch of the Congress of the United States. In this connexion, it may not be improper to inform your honorable body that there had been no statutory provision by the legislature of your memorialist regulating the choice or election of United States senators by her general assembly since the adoption of her present constitution. Hence any election which should take place would of necessity be governed by the provisions of the Constitution of the United States and of this State. In addition, also, to the binding force of the Constitution of the United States as the supreme law of the land, the legislature of your memorialist did enact that among the laws governing this State should be first the Constitution of the United States.—(See Revised Statutes, volume 1, page 351.) Then, as your memorialist was without any law on this subject other than that contained in the Constitution as above named, it would be unnecessary to direct the attention of your honorable body to the provisions of section 3 of article 1 of the Constitution of the United States, as also section 4 of the same article. Your memorialist would further represent, that since the requirements of the Constitution of the United States in the choice of senators of the United States, as above referred to, are upon the legislatures of the several States, the constitution of Indiana clearly defines her legislature, and declares of what it shall consist, (see constitution of Indiana, article 4, section 1; see also section 11 of article 4,) which is further descriptive of what is essential to constitute it a body capable of transacting legislative business. From what has been shown of the law, it will be obvious at once that the only rule by which your memorialist could be governed in the choice of persons to act as her senators will be found in that provision of the Constitution of the United States which requires such choice to be made by the legislature; and as the terms legislature and legislative power have been defined by the organic law of this State, it will be no difficult matter to ascertain wherein that law has been complied with or disregarded in any case that may have been, or will be, presented for the consideration of your honorable body.

Your memorialist is now prepared for the assertion that the persons now assuming to represent her in the Senate of the United States are not now, and have not been, since the action of certain members of her general assembly, in February, 1857, upon which action it is claimed that said persons were elected senators in the United States Senate for Indiana, the legally elected or constitutionally chosen senators of Indiana; and in support of her denial of their right to act as such senators, for her and in her behalf, your memorialist would earnestly invoke the attention of your honorable body to the following facts, viz:

The session of the general assembly which convened in January, 1857, succeeded the general election of 1856, at which time an election for governor and lieutenant governor was held. Section 4 of article 5 of the constitution of Indiana provides that the result of this election shall be published by the speaker of the house of representa-

tives in the presence of both houses of the general assembly. On Monday morning of January 12, 1857, a message was received by the senate from the house of representatives, inviting the senate to attend in the hall of the house of representatives at "half-past 2 o'clock" for the above purpose.—(See senate journal, page 41.) The senate convened at 1 o'clock p. m., and immediately took up the message of the house, and was proceeding to amend the same, when the president of the senate laid before the senate a communication from the speaker of the house of representatives, in which said speaker informs the senate that he would proceed *instantly* to open and count, and publish the vote for governor and lieutenant governor; whereupon the president of the senate announced that his connexion with the senate as their presiding officer had terminated, and immediately, without adjournment or motion therefor, and, as your memorialist affirms and verily believes, in violation of section 10 of article 4 of her constitution, left the senate, followed by twenty-three of the senators. The remainder of the senators occupied their seats and proceeded with business; but, upon a call of the senate being had, it was ascertained a quorum, or two-thirds, was not present, the senate could make no disposition of the business then pending; a resolution embodying this fact was introduced and spread upon the journal, and the senators present continued in their seats until the return of the absent senators, preceded by the incoming lieutenant governor and ex-officio president of the senate, when the pending questions were taken up in their order and disposed of as though no interruption had taken place. The president of the senate left the chair and hall of the senate at five minutes before 2 o'clock, upon receipt of the communication of the speaker of the house of representatives, which communication your memorialist affirms and believes to have been wholly unauthorized by the house of representatives, as the journals of said house contain no record of such authority or change in the time for that duty from the time named in the resolution sent to the senate. For a record of these facts, see senate journal, pages 41 to 46, inclusive.

It is further a part of this proceeding that, whilst in the meeting thus unauthorized, the president of the senate and governor elect did at first preside during the counting of the vote, but, upon the conclusion of that ceremony, appointed a senator to occupy the position of presiding officer, who then and there assumed, without motion, leave, or desire therefor on the part of said meeting, the power to adjourn said meeting to the second day of February following, and did so adjourn it. On February 2 said meeting was again convened, and, as before, by leaving the senate, as on the former occasion, without a constitutional quorum, and without adjournment or motion therefor, (see senate journal, pages 221 and 222.) At this last named meeting, the lieutenant governor adjourned, as the senator on a former occasion had done, the meeting to the 4th day of February. On Wednesday, the 4th of February, the president of the senate again left the chair, and, with a number of senators, left the senate chamber, as on former similar occasions, in the midst of its deliberations, and without adjournment. At this unauthorized meeting the persons who have since claimed to be the senators of your memorialist claim to have been

electd, and upon that claim have been permitted to act as such senators by your honorable body to the present term.

It will thus be apparent to your honorable body that this unauthorized meeting, at which the present incumbents claim to have been elected United States senators, was originated in violence and continued by insubordination. The constitution of this State, in section 4 of article 5, under which those who contend for the legality of the meeting above named, imposes a duty upon the speaker of the house of representatives alone, and does not, by any fair construction, enjoin upon the legislature any obligation at all, much less even remotely contemplate the organization of a joint convention of the two houses. But in the latter clause of section 5 of the same article, in cases of two persons having an equal and the highest number of votes, provision is made for deciding the question by a joint vote of the general assembly. Now it is only necessary, in order to ascertain whether a joint convention is contemplated in this article, to inquire, as a duty is here devolved on the *general assembly*, what the constitution means by the term *general assembly*? To answer this question it is sufficient to refer to sections one and two of article four of the constitution, which should be read in connexion with section eleven of the same article. But if the meeting, originated as herein described, had no legislative power, your memorialist would respectfully submit whether on a mere adjournment of such meeting could, by any possibility, confer upon it authority sufficient to legalize the act under which the present incumbents hold the honor and exercise the power of United States senators for the State of Indiana. But, again, if this meeting had not originally belonging to it the power of legislation—if it was not at first a legal organization, was it not less so when an effort was made to perpetuate its existence by an individual who had been called to preside over its deliberations by the presiding officer of the senate at a moment when his power to preside as such officer ceased and had expired? Yet such was the case, for the president of the senate, who had the power when the senate was in session in its own chamber to call any senator to the chair temporarily at this unauthorized meeting, which was not a senate, appointed, when he had no longer the power himself, a senator to conduct its deliberations. This senator assumed to adjourn the meeting to a distant day, at which the meeting assembled, and was again, in like manner, adjourned to another day; at which last named day the wrong of which your memorialist complains was inflicted upon her.

Your honorable body will at once perceive that no motion, concurrent or joint resolution, for electing senators, or other proposition for that purpose, had been previously made or attempted. The senate had never been invited by the house, or the house by the senate, to join, participate in, or consent to, any such election or elections. The object, if there was an object, was studiously concealed; at least so far as the journals of either house show. The election thus held, by which the present incumbents claim their seats, was without the knowledge, consent, or participation of a quorum of either house of the general assembly; and notwithstanding a majority of the members *per capita* of the two houses may have assented to, and taken part in, the proceedings of said meet-

ing, any election thus had could certainly have no binding force when the meeting itself was void. That there was not a quorum of the senators present in the above meeting, if additional evidence is wanting, your memorialist would refer your honorable body to the protest of the twenty-three senators who did participate in it against the action of the majority of the senators who remained in session during the absence of the protestants.—(See senate journals, pages 480, 481, 483.) Again: If the action of the majority of the senators who remained in session after the minority had uncereemoniously deserted the senate chamber was illegal and void, as the protestants allege, your memorialist will leave your honorable body to characterize the acts, doings, and resolves of the minority out of the senate chamber. But the friends of the proceeding against which your memorialist now complains should have been estopped by their own acts, distinctly and deliberately performed on two separate occasions. The first was in 1855, as will be seen by reference to senate journals of that year, page 523, wherein they introduced a resolution for the election of a United States senator, with the following preamble:

“Whereas there is no law on the statute-book providing for the election of United States senator; and in the absence of any statutory provision, it is competent for the legislature to prescribe, by resolution, the manner of appointment and the person to be appointed: Therefore, the house of representatives concurring therein, resolved,” &c. For which preamble and resolution they gave an undivided vote. Again, in 1857, (see senate journal, pages 196 and 197,) they distinctly avowed that an election of United States senators by each house, in their separate and independent capacity, was a legal and constitutional manner of electing, and that at the proper time they would so proceed to elect United States senators. This resolution was passed by their undivided vote on the 29th of January, 1857, after the second adjournment of the unauthorized meeting to which reference has hereinbefore been made, and but six days before its last session, when the present incumbents claim to have been chosen senators. The above are substantially the facts and circumstances accompanying and surrounding the pretended election of the sitting members; and the chief reliance which they had and have in support of their right is the choice of a majority of the two houses in joint convention. Your memorialist would earnestly invite the serious consideration of your honorable body to the main points: 1st. Does the constitution of Indiana provide for a joint convention for the election of United States senators? 2d. If so, was this meeting, at which the sitting members were chosen, such a constitutional joint convention. The answer to these questions your memorialist will cheerfully leave with your honorable body under the light of the facts and circumstances herein detailed. But aside from the facts herein embodied, your memorialist would further advert to the position assumed by those who contend for the right of the sitting members on the ground that your honorable body has already acted in the premises, and decided the question at issue in favor of the incumbents. Your memorialist would not question the right of your honorable body to decide any and all questions of this character upon the facts adduced at the time of such

decision, for such is the authority conferred upon your honorable body by the organic law of the nation. That you so decided the present question is obvious ; but your memorialist would respectfully suggest that the legislative power of Indiana was, at the time you so decided, as fairly and fully before your honorable body protesting against the right of the sitting members to admission as her senators, as that legislative power was then demanding such admission. A majority of the house of representatives, but not a quorum, and a minority of the senate of Indiana, send to your body two persons whom they call senators, while a minority of the house of representatives and a majority of the senate follow up this action with a solemn protest, declaring the action of the former outside of, and in conflict with, the constitution of this State. This fact, when taken in connexion with the provision of the constitution, which requires two-thirds of each house to constitute a quorum ; and in view of the additional fact that no resolution for so electing senators was ever agreed upon or adopted by both or either of the houses, appears to the mind of your memorialist conclusive that the sitting members were not commissioned in accordance with the requirements of the Constitution of the United States or the will of the legislature of Indiana. That there were no other claimants contesting the seats awarded to the incumbents your memorialist regards as a matter of no vital moment ; but that such decision, founded only upon what may be regarded as "*prima facie*" evidence, should be held as conclusive, and a bar to the admission of evidence of a higher character in support of the right of a sovereign state of the Union to an equitable and constitutional representation in the Senate of the United States, is a consequence to which your memorialist cannot assent. At that time it was a question whether the applicants for admission should be allowed the benefit of the evidence presumed from the possession of credentials attested by the seal of the State, without inquiring as to the validity and regularity of such authentication, or whether such authentication, if, indeed, it appeared regular, was even essential.

Now, however, the issue is one of broader and deeper significance. For one of the component independent sovereignties of the Union declares that which has been claimed as her act never to have been done by her, and respectfully submits the question whether she will be permitted herself to select among her own citizens the persons whom she chooses to represent her in your branch of the federal legislature, or whether unauthorized parties, acting in a revolutionary manner, and in conflict with her organic law, but assuming to act for her in her name and on her behalf, shall be permitted to choose her representatives. Your memorialist would here express an entire and undiminished confidence in the disposition of your honorable body to carry out and exemplify in all your decisions affecting the rights of States as well as individuals the spirit contained in the words of the preamble to the Constitution of the United States. In the full assurance that that will predominate in this as in all other important issues, your memorialist apprehends no conflict between the national and State sovereignty, but will cherish to the end the assurance that justice and equity will prevail throughout, and eminently characterize

the result of the application herein made. With this view of the matter, your memorialist cannot regard as any serious obstacle to an equitable adjustment of her rights the decision already made in behalf of the incumbents. That decision was made upon "*prima facie*" evidence of an inferior order, while now your memorialist comes in her own proper person with the unquestioned and unquestionable authority of an act of her legislature. Your memorialist fully appreciates the fact that your honorable body is the only tribunal before which such questions can be tried; and that from its decisions there is no appeal, there being above and beyond it no higher or even equal power. But your memorialist would seek no other tribunal, or question the right to the exercise of the power in the decision that has been made, but, relying on that sense of justice which underlies all of our institutions, demands in the tribunal of your honorable body a review or rehearing such as the meanest suitor would not be denied in the highest judicial court known to the laws of the land. It may not be inappropriate for your memorialist to suggest that any other course on the part of your honorable body might be productive of the most alarming consequences; for if any number of the States of the Union should be so unfortunate as your memorialist as to have confirmed upon individuals whom they had not chosen credentials of election as United States senators, and your honorable body, upon such credentials, would admit them as members, it would not be a sufficient answer to such States, when applying for redress and demanding their rights, that the Senate of the United States had once passed upon the question, and that her power was already exhausted on the subject.

Your memorialist holds to the doctrine that the power lodged in your honorable body to do justice to, and deal equitably with, those who delegated to you that power, can never be exhausted, however often it may have been exercised, until such justice has been done in the most complete and ample manner. Any other view of that power would make it an irresponsible, independent authority, fully armed for vengeance and wrong, but powerless for the accomplishment of those wise and beneficent purposes for which it was established. Recognizing, in the economy of both State and Federal government, the principle that everything salutary depends upon the consent of the governed, your memorialist cannot regard the argument of a want of power in your honorable body to review and revise its decisions as at all in harmony with the spirit of our institutions, or consonant with the almost unlimited power delegated to the national legislature. Such a concession on the part of the several States would be equivalent to a surrender of their rights, without which they would cease to be sovereign powers and descend to the condition of colonies, wherein they would be compelled to the support of a government in which they would be without representation. With that unfeigned devotion to the union of these States which has hitherto marked her ready and willing acquiescence in the expressed will of the national sovereignty, and which she cherishes the assurance will ever characterize her attachment for its undivided dignity and honor, your memorialist confidently presents, and asks for admission, as her legally elected and constitutionally chosen Senators, the persons herein named,

whose title to the honor and claim to the position is thus solemnly authenticated by the highest and most august tribunal known to the constitution of the State of Indiana.

Resolved by the senate, the house of representatives concurring therein, That the foregoing memorial, certified by the president and secretary of the senate, and by the speaker and clerk of the house of representatives, be, and it is hereby, directed to be forwarded to the Vice President of the United States, to be by him laid before the Senate of the United States.

We, John R. Craven, president *pro tempore* of the senate of Indiana, and James H. Vawter, secretary of the senate of Indiana, hereby certify that the above and foregoing memorial passed the said senate on Wednesday, the 12th day of January, A. D. 1859, by the vote of a majority of all the senators elect of said senate.

In witness whereof, we hereunto affix our hands, this 15th day of January, A. D. 1859.

JNO. R. CRAVEN,
President of the Senate.

JAMES H. VAWTER,
Principal Secretary of the Indiana Senate.

We, Jonathan W. Gordon, speaker of the house of representatives of the State of Indiana, and Richard J. Ryan, clerk of the house of representatives of the State of Indiana, hereby certify that the above and foregoing memorial passed the said house on Friday, the 14th day of January, A. D. 1859, by a vote of a majority of all the members elect of said house.

In witness whereof, we hereunto affix our signatures, this 15th day of January, A. D. 1859.

J. W. GORDON,
Speaker of the House of Representatives.
RICHARD J. RYAN,
Clerk of the House of Representatives.

MEMORIAL OF THE STATE OF INDIANA

Whereas the State of Indiana is one of the States of the Union, and the people thereof are entitled to the same rights and privileges as the people of the other States of the Union;

And whereas the people of the State of Indiana are entitled to the same rights and privileges as the people of the other States of the Union;

And whereas the people of the State of Indiana are entitled to the same rights and privileges as the people of the other States of the Union;

JAMES H. VAWTER,
President of the Senate.
JAMES H. VAWTER,
President of the Senate.

And whereas the people of the State of Indiana are entitled to the same rights and privileges as the people of the other States of the Union;

J. W. GORDON,
Speaker of the House of Representatives.
RICHARD J. MYN,
Clerk of the House of Representatives.

His Dec. 24—2